



Novitz, T. (2016). Changes in employment status under austerity and beyond – Implications for freedom of association. *Dublin University Law Journal*, 39(1), 27-50. <http://home.heinonline.org/titles/Law-Journal-Library/Dublin-University-Law-Journal/?letter=D>

Peer reviewed version

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available online via Heinonline. Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

Changes in employment status under austerity and beyond – Implications for freedom of association

Tonia Novitz, Professor of Labour Law, University of Bristol*

Since the financial crisis and the attempts made subsequently to alleviate sovereign debt, European Union (EU) Member States have pursued policies that limit access to legally recognised forms of ‘employment’. Such policies have well-documented effects on individual employment rights, such as access to protection from dismissal, but also have the capacity to undermine scope for freedom of association. That effect may arise by virtue of domestic labour laws, but also EU law relating to employment status in the context of collective representation. There is the possibility that EU institutions could redefine employment status to encompass non-standard forms of employment and there are tentative moves in this direction. Recourse to Council of Europe institutions to promote protection of freedom of association as a universal human right may also prove an effective means of addressing the legacy of austerity policies.

1. Introduction

Access to standard forms of employment that attract particular protection under employment law, whether as an ‘employee’ or as a ‘worker’,¹ has declined in the wake of

* tonia.novitz@bristol.ac.uk. An early draft of this paper was presented at *European Lawyers for Workers Network - European Labour Law conference –Under Pressure of The Troika – The Impact on Collective Labour Rights in Southern Europe and Ireland* in Madrid in October 2015; and a fuller version was delivered at the *Trinity College Dublin Colloquium on Emerging from Austerity – Forging Future Labour Agendas in Europe* organised by Professor Mark Bell in March 2016. I would like to thank participants at both those events and my Bristol colleagues for their extensive comments and suggestions. In particular, I owe thanks to Nicola Kountouris for sharing his views on some of these matters and Michael Ford for extensive discussions relating to the legal analysis. All errors are my own.

¹ For the purposes of this article, the terms ‘employee’ and ‘worker’ are generally used interchangeably, as they have been in recent Court of Justice (CJEU) judgments, such as Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, unrep. Judgment of 4 December 2014 (FNV) at paras 34 and 36. A distinction is made only when discussing

the financial crisis. This paper begins by considering how the policies that have come to be associated with austerity are connected to this change and what their effects have been.

Domestic legal reforms relating to employment status would seem to stem from a desire to reduce public spending in the light of budgetary deficits and to encourage investment. Removal of the protection of employment law, making someone a ‘non-worker’, reduces costs associated with individual employment rights for public and private sector employers. Additionally, it is argued here, that such a shift also has significant implications for collective wage setting and trade union capacity to resist restructuring and redundancy (whether in the public or private sectors) which could otherwise have costs attached.

To some extent, the impact of the attempts to designate certain forms of employment as something other than ‘work’ depends on the specificity of national laws. The domestic legal framework operating in the United Kingdom (UK) illustrates how deprivation of employment status impacts on freedom of association. More significantly, principles developed by the Court of Justice of the European Union (CJEU) have the potential to make employment status a barrier to collective representation and collective action. This potentially poses a problem for countries like Ireland, where politicians have sought to enable participation in bargaining for atypical workers, so as to protect those working in professions such as acting and journalism.² They were prevented initially by strict instructions from the Troika, and more recently by domestic application of EU competition law as interpreted by the domestic Commission Authority.³

There are several ways in which to counter the legacy of austerity policies relating to employment status in order to revive access to freedom of association. One is further

specific aspects of UK law regarding protection from dismissal and trade union discrimination, in respect of which see the Employment Rights Act 1996 (ERA), s.230 and the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), ss 295-6.

² See the Competition (Amendment) Bill 2016 promoted by Ivana Bacik at <<http://ivanabacik.com/legislation/2016/01/20/competition-amendment-bill-2016/>> accessed 6 May 2016.

³ See the summary at <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3254749:NO> accessed 6 May 2016.

development of EU jurisprudence on the ‘autonomous meaning’ of ‘worker’,⁴ whether by the CJEU or regulatory intervention, to accommodate changes in contemporary labour markets.⁵ There are tentative indications that progress may be made in this direction given recent case law and policy documents.

A further possibility is to challenge the exclusion of the non-worker from freedom of association entitlements on human rights grounds. This is akin to the ‘Supiot’ option,⁶ which indicated that we could guarantee certain labour standards for all persons rather than requiring them to meet formal legal criteria for ‘employment’. In this respect, it may be helpful to pursue claims within the Council of Europe. For example, a case could be brought under Article 11 of the European Convention on Human Rights 1950 (ECHR) on the basis that freedom of association is an entitlement of ‘every one’ rather than just ‘workers’. We might also consider the utility of Articles 5 and 6 of the European Social Charter 1961 (ESC) in this respect, although as these provisions also refer to ‘workers’ this entails looking at a blend of options 1 (revising the definition of worker) and 2 (claiming universal rights to freedom of association). In this way, the softer law of the ESC can have impact on EU soft law mechanisms that have been so significant to date in promoting austerity policies.

2. The financial crisis, the sovereign debt crisis and issues arising directly regarding collective bargaining

The financial crisis has gone through a number of stages. Initially ignited by failure of speculative investments (in countries such as Iceland) and excessive sub-prime mortgage lending (overly inflating property prices in the United States and elsewhere), there followed

⁴ Case C-316/13 *Fenoll v Centre d’aide par le travail ‘La Jovenne’ and Association de parents et d’amis de personnes handicapées mentales (APEI) d’Avignon* unrep. Judgment of 6 March 2015 (*Fenoll*), para. 25.

⁵ As advocated by Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011).

⁶ Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP 2001). See for contemporary advocacy of such an approach, in particular, Valerio De Stefano, ‘Non-standard Workers and Freedom of Association: A critical analysis of restrictions to collective rights from a human rights perspective’ (2015) Centre for the Study of European Labour Law Working Papers WP 123/2015.

the actual (or imminent) collapse of key financial institutions. Some of the banks were then 'rescued' by national governments, which also provided temporary protection of domestic industries (the automobile industry being a notable example) that would otherwise not have withstood the economic shocks. There followed significant State budgetary deficits (a 'sovereign debt crisis') which, as the banks stabilised, still fell to be addressed.⁷

The response of the EU and its Member States was one of 'austerity'.⁸ 'Bailouts' and other forms of financial assistance for EU States experiencing severe sovereign debt were accompanied by Memoranda of Understanding (MoU) which set out policy prescriptions as to how national governments would manage their debt.⁹ Three major institutions engaged in this process ('the Troika'): the European Central Bank, the European Commission and the International Monetary Fund (IMF). Their policy prescriptions followed a pattern with which the IMF was most familiar, namely the 'Washington Consensus', thought by many to have been previously discredited.¹⁰

The actual use of harsh monetary conditionality by the Troika affected merely eight out of a potential 28 EU States. However, these programmes set up a policy prescription to be applied more generally. Austerity norms have been disseminated through ostensibly soft law EU mechanisms, such as the Europe 2020 Growth Strategy¹¹ and accompanying Country Specific

⁷ Carmen M. Reinhart and Kenneth S. Rogoff, *From Financial Crash to Debt Crisis* Working Paper 15795 <<http://www.nber.org/papers/w15795>> accessed 6 May 2016. See also Jacopo Carmassi, Daniel Gros and Stefano Micossi, 'The Global Financial Crisis: Causes and Cures' (2009) 47 *Journal of Common Market Studies* 977.

⁸ The Oxford English Dictionary defines 'austerity' as (*inter alia*): 'Difficult economic conditions created by government measures to reduce public expenditure.'

⁹ See Catherine Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2015) 67 *Current Legal Problems* 199, 230.

¹⁰ See Robin Broad and John Cavanagh, 'The Death of the Washington Consensus?' (1999) 16 *World Policy Journal* 79; James M. Cypher, 'The Slow Death of the Washington Consensus on Latin America' (1998) 25 *Latin American Perspectives* 47; Robert K. McCleery and Fernando De Paolis, 'The Washington Consensus: A post-mortem' (2008) 19 *Journal of Asian Economics* 438.

¹¹ See Communication from the Commission, EUROPE 2020: A strategy for smart, sustainable and inclusive growth COM(2010) 2020 final.

Recommendations (CSRs) ¹² addressed to each individual Member State. The Recommendations are, of course, said to be 'country specific' but have tended to follow a common pattern.¹³

Pressure has been placed on EU States to address the 'rigidities' of labour markets, such that there have been recommendations to bypass trade union participation in wage-setting¹⁴ and to end national level and sectoral bargaining.¹⁵ The latter is perhaps the most peculiar from a collective labour angle, given that it was determined by the CJEU in 2008 that only 'collective agreements of general application', namely nation-wide sectoral agreements rendered universal through legislation, currently have the capacity to set terms and conditions binding on service suppliers of posted workers.¹⁶

Further, States aiming to supply public services more cheaply and thereby reduce government debt have sought to reduce trade union intervention in wage setting in the public sector.

¹² Commission, 'Recommendation for a Council Recommendation on the economic policy of the euro area' COM(2015) 992 final, 2.

¹³ <http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm> accessed 6 May 2016; although note that for 18 EU States this also involves a macro-economic imbalance procedure under which more stringent demands are made regarding the budgetary deficit. See <http://ec.europa.eu/economy_finance/economic_governance/macroeconomic_imbalance_procedure/index_en.htm> accessed 6 May 2016>.

¹⁴ In respect of this internal devaluation strategy, see Aristeia Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The sovereign debt crisis and labour market regulation in Greece' (2012) 41 ILJ 276, 291-3; also Imre Szabo, 'Between Polarization and Statism – Effects of the crisis on collective bargaining processes and outcomes in Hungary' (2013) 19(2) Transfer 205, 211.

¹⁵ Koukiadaki and Kretsos (n 14) at 290; Hermes Augusto Costa, 'From Europe as a Model to Europe as Austerity: The impact of the crisis on Portuguese trade unions' (2012) 18 Transfer 397, 408; and Aurora Trif, 'Romania: Collective bargaining under attack' (2013) 19 Transfer 227, 231-2.

¹⁶ See Case C-346/06 *Rüffert v Land Niedersachsen* [2008] ECR I-1989. Despite the decision of the Court to allow regional legislation to set wages in relation to conditions for public procurement (Case C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* unrep. Judgment of 17 November 2015), this requirement regarding the form of collective agreement remains good law. Note the Commission Proposal to amend the Posted Workers Directive COM(2016) 128 final suggests a key reform (Article 3.1.a), namely recognition of company level bargaining in sub-contracting chains, but the Commission has flagged a significant number of Member States as being opposed to the measure for the time being.

Similarly, they have attempted to tame the capacity of trade unions to disrupt plans for reorganisation in the delivery of public services designed to lead to reduction of jobs and thereby the wage bill. States seeking to boost economic growth have tried to make employment cheaper for current employers in order to enhance their profitability. Further, to attract foreign investors, it has been regarded as desirable to reduce trade union interventions in the private sector that could lead to costs (whether associated with wages or restructuring).¹⁷

In this context, the International Labour Organisation (ILO) has struggled to challenge the clear lack of compliance with collective bargaining norms in the context of the 'emergency' situation caused by the financial crisis. ILO supervisory bodies, whether the Direct Contact Mission or the Governing Body Committee on Freedom of Association (CFA) or the Committee of Experts on the Application of Conventions and Recommendations (CEACR), have limited themselves to a general recommendation that 'social dialogue' be pursued to mitigate harms caused by the 'emergency' measures and to rebuild civic and representative capacity among workers' organisations.¹⁸

In what would appear to be a concession to these rather mild ILO recommendations, the European Commission has said that it will renew its emphasis on social dialogue in 2015.¹⁹ What is potentially even more significant is the specific reference to 'social dialogue' in various CSRs issued to EU States in 2015 and in the proposals for Employment Guidelines.²⁰ Yet there remains the question of how social dialogue (even in the simplest form of discussion between social actors) is possible when one considers the ways in which the employment

¹⁷ Stefan Clauwaert and Isabelle Schömann, *The Crisis and National Labour Law Reforms: A mapping exercise* ETUI Working Paper 2012.04; and Aristeia Koukiadaki, Isabel Tavora, Isabel and Miguel Martinez Lucio, *The Transformation of Joint Regulation and Labour Market Policy in Europe during the Crisis: Comparative Project Report* (University of Manchester/The European Commission 2014).

¹⁸ (ILO) *Report on the High Level Mission to Greece* (ILO 2011) para. 304. See also Tonia Novitz, 'The EU and the Right to Strike: Regulation through the Back Door and its impact on Social Dialogue' (2016) 27 *King's College Law Journal* 46.

¹⁹ European Commission, *A New Start for Social Dialogue* (EU 2015).

²⁰ ANNEX - Integrated guidelines - to the Proposal for a COUNCIL DECISION on guidelines for the employment policies of the Member States COM(2015) 98 final, 3.

status has been restricted, so that previous capacity to participate in trade union activity is undermined.

3. Changes in ‘employment’ status in the context of austerity

Employment status has long been a contested and complex issue, perhaps reflected in the fact that the subject remains the subject of an ILO Recommendation rather than a Convention, which could set more concrete standards.²¹ Prior to the financial crisis, commentators were already identifying the emergence of a ‘*precariat*’ or peripheral workforce²² that would not fit into established categories of ‘employee’ or ‘worker’; examples being dependant subcontractors, agency workers, casual workers, temporary migrant workers and those hired on ‘zero hours contracts’.²³ Women have long been over-represented in atypical work, both in developing and developed countries, since their participation in the labour market has to be organised around their expected caring responsibilities which may make it harder for them to comply with the conventional parameters of a standard employment relationship.²⁴

Others have observed that supply chain regulation and complex corporate links have made it difficult not just to identify an employee but who might be the employer.²⁵ It has been argued that contemporary use of ‘franchises’ blurs these boundaries even further,²⁶ as does the use of technological devices which distance work from the beneficiary of that work.²⁷

²¹ ILO Employment Relationship Recommendation, 2006 (No. 198).

²² Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury 2014).

²³ De Stefano (n 6) at 8.

²⁴ As discussed in Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar 2016). See also Leah Vosko, *Managing the Margins: Gender, citizenship and the international regulation of precarious employment* (OUP 2010); and Maria Karamessini, Jill Rubery (eds), *Women and Austerity: The economic crisis and the future for gender equality* (Routledge 2014).

²⁵ See Jeremias Prassl, *The Concept of the Employer* (OUP 2015).

²⁶ David Weil, *The Fissured Workplace: Why work has become so bad for so many and what can be done to improve it* (Harvard UP 2014).

²⁷ Valerio De Stefano, ‘The Rise of the “Just-in-Time Workforce”: On-demand work, crowd work and labour protection in the “Gig-Economy”’ ILO Working Paper <http://www.ilo.org/travail/whatwedo/publications/WCMS_443267/lang--en/index.htm> accessed 6 May 2016.

In the longer term, capitalism would seem to rely on the forms of reciprocal control imposed by law on the contract between employer and employee and we might expect the re-establishment of standard employment practices in Europe as the Member States experience fiscal stability and financial recovery.²⁸ However, in emergent forms of capitalism, or temporary crises, governments (and employers) can have a short-term interest in promoting atypical work to thwart access to individual rights or indeed collective representation and action. In those circumstances, it is possible to detect a carefully crafted vertical disintegration of the employment relationship.²⁹ While there are notable differences between EU Member States, from 2008 onwards some clear trends have emerged regarding employment status.

The declining coverage of individual employment law seems to have been exacerbated by policies actively pursued following the financial crisis. More of those engaged in paid work in the public sector are designated in contractual documentation as being hired outside an 'employment relationship' to facilitate ease of dismissal and reduction of wages. In this way, public spending is restricted.³⁰ Further, the desire to attract foreign direct investment (FDI) would seem to have influenced State designation of employment status. Private employers are encouraged to invest on-site in a country on the basis that they will have at their disposal a flexible and easily expendable workforce.³¹

Greece is perhaps the best example. In Greece, Act 3846/2010 introduced 'a wide range of flexible forms of employment (including tele-work, part-time work, temporary employment

²⁸ As observed by Zoe Adams and Simon Deakin, 'Institutional Solutions to Precariousness and Inequality in Labour Markets' (2014) 52 BJIR 779.

²⁹ Hugh Collins, 'Independent Contractors and the Vertical Disintegration of the Employment Relationship' (1990) 10 OJLS 353.

³⁰ For this general austerity-related trend, see John Peters, 'Neoliberal Convergence in North America and Western Europe: Fiscal austerity, privatization, and public sector reform' (2012) 19(2) Review of International Political Economy 208, 218 et seq. See also Raymond Torres, 'European Labour Markets in Crisis' (2013) 152 International Labour Review 167, 168.

³¹ Sophie Meunier, 'Beggars can't be Choosers': The European Crisis and Chinese Direct Investment in the European Union' (2014) 36(3) Journal of European Integration 283.

agencies, short-term work and suspension of work)' while Act 3986/2011 set out new rules on successive fixed term contracts. Young workers were given extended probationary periods (at least temporarily removing protection from dismissal) while they were also to be excluded from the scope of the national collective agreement.³²

In Italy there has been imitation through 'a two-tier reform approach' creating 'a dual labour market with precarious jobs flanking steady jobs'. The result has been described as being 'low pay and unproductive labour, replacing steady jobs, instead of innovating in the workplace and investing resources in research, training and human capital'.³³

In Portugal, reform was dictated by a MoU of May 2011 which required 'a comprehensive plan to promote flexibility, adaptability and mobility of human resources across the administration', with the goal of reducing the number of staff.³⁴ Hermes Augusto Costa has observed that this policy has had two effects: one being the introduction of genuinely more precarious forms of employment with vulnerability to dismissal not previously seen in the public sector, but the other being the proliferation of false 'self-employment' (with their emblematic green receipts) which have been tolerated if not encouraged.³⁵

In Spain, a letter of the ECB to the government of 5 August 2011 made strong recommendations for the introduction of temporary work-related contracts subject to

³² Koukiadaki and Kretsos (n 17) at 288-289. See also Matinna Yannakourou, 'Challenging Austerity Measures Affecting Work Rights at Domestic and International Level: The Case of Greece' in Claire Kilpatrick and Bruno De Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The role of fundamental rights' challenges* (EUI 2014) EUI Working Paper LAW 2014/5 at 20.

³³ Davide Antonioli and Paolo Pini, 'Europe and Italy: Expansionary Austerity, Expansionary Precariousness and the Italian Jobs Act' September 2014 Quaderni DEM, volume 3 15/2014 available at: <<http://docente.unife.it/paolo.pini/working-paper-2014/europe-and-italy-expansionary-austerity-expansionary-precariousness-and-the-italian-jobs-act-dem-15-2014/view>> accessed 6 May 2016.

³⁴ As reported by Alan Stoleroff, 'Employment Relations and Unions in Public Administration in Portugal and Spain: From reform to austerity' (2013) *European Journal of Industrial Relations* 1, 5.

³⁵ Costa (n 15), 401-405.

cheaper severance payments and not subject to restrictions on renewal.³⁶ The Royal Decree Law 3/2012 on Urgent Measures to Reform Labour Market confirmed by Parliament as Law 3/2013 therefore introduced a new type of 'entrepreneur contract', for employers with fewer than 50 employees offering unrestricted possibilities for dismissal in the first year.³⁷ This is in addition to increased use of outsourcing and temporary agency work in the Spanish public sector³⁸ and further elaboration and application of the Code of the Autonomous Worker initially introduced in 2007.³⁹

It is difficult to find concrete information regarding Eastern European States affected by bailout, but there are indications that the numbers of those who are hired as independent contractors is increasing, very possibly due to additional tax benefits for such status given to both hirers and those opting to work in this way. For example, in Romania the proportion of self-employed stood at 30% of the workforce in 2006 but today is closer to 50%.⁴⁰

The UK, in terms of competitive imitation (even without a MoU), has rather skilfully engineered the 'employee-shareholder' who can exchange key employment rights (such as protection from unfair dismissal) for a doubtful £2,000 share in their employer's business.⁴¹ It is, of course, arguable that protection from unfair dismissal has in any case been removed *de facto* for many by the introduction of Employment Tribunal fees, which have seen a

³⁶ Maria Luz Rodriguez, 'Labour Rights in Crisis in the Eurozone: The Spanish case' in Kilpatrick and De Witte (n 32) at 108-9.

³⁷ Fernando Rocha, 'Crisis and Austerity Policies in Spain: Towards an authoritarian model of industrial relations' in Fernando Rocha (ed), *The New Economic Governance and its Impact on Collective Bargaining Systems* (EPSU 2014) available at <http://www.epsu.org/IMG/pdf/Economic_Governance_and_Collective_Bargaining_GOCOB_A_final_report.pdf> accessed 6 May 2016, 184. Also outlined by Rodriguez (n 41) above at 109; see also Koukiadaki, Tavora and Martinez Lucio (n 17) at 42.

³⁸ Consuelo Chacartegui, 'Segmentation of Public Employment in the Frame of Austerity Policies: precariousness as a Consequence' (2014-14) 36 Comparative Labor Law and Policy Journal 203, 208-9.

³⁹ Julia Lopez, 'Formalizing the Segmentation of Workers' Rights: Tensions among regulatory levels' (2014-15) 36 Comparative Labor Law and Policy Journal 281, 286.

⁴⁰ See <<http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/romania/romania-self-employed-workers>> accessed 6 May 2016; IMF, Romania: Selected Issues (IMF European Dept, 2015) at 69, <<https://www.imf.org/external/pubs/ft/scr/2015/cr1580.pdf>> accessed 25 April 2015.

⁴¹ The Growth and Infrastructure Act, s.31 inserting s.205A into the ERA.

dramatic decline in the number of unfair dismissal cases being heard.⁴² Additionally, the number of independent contractors or ‘micro-businesses’ in operation in the UK labour market is increasing as are rates of atypical hiring (such as temporary agency work, one person companies or zero hours contracts) together with in-work poverty.⁴³

4. The impact of employment status on coverage of domestic and EU collective labour law

An absence of protection as an ‘employee’ or ‘worker’ has implications for access to freedom of association and trade union representation. These effects will to a significant degree turn on national law, as is illustrated here with reference to the domestic UK legal framework. However, they also depend on an over-arching EU approach to employment status, especially in the field competition law, which has the potential to override collective agreements that seek to protect labour standards for those designated self-employed. The guidance given by the CJEU on the scope of employment status and its relevance is therefore of considerable significance. It is here that we are seeing moves towards the protection of those hired in atypical ways, to the extent that they are found to be ‘false’ self-employed.

a. How UK domestic labour laws can impede access to freedom of association

In Germany, atypical workers are able to join unions and to be covered by collective agreements. For example, IG Metall had recruited 50,000 agency workers by 2012 and set a

⁴² See *R (on the application of Unison) v Lord Chancellor (No.2)* [2015] IRLR 99 (QBD) and Nicole Busby, Michael Ford, Morag McDermont and David Renton, ‘An IER response to the Law Society consultation: How Should Employment Tribunals Operate in the Future’ (Institute of Employment Rights 2015).

⁴³ See Andrew Henley, ‘The Post Crisis Growth in the Self-Employed: Volunteers or Reluctant Recruits?’ (2015) IZA Discussion Papers, No. 9232 available at: <https://www.econstor.eu/dspace/bitstream/10419/114107/1/dp9232.pdf> accessed 6 May 2016.

sectoral minimum wage through collective agreement that covers those workers.⁴⁴ However, such practices are far from uniform. In this context, UK law illustrates the potential dangers for those hired in non-standard forms of employment.

Firstly, in the UK, only an 'employee' (hired under what is deemed to be a common law contract 'of service') can make a statutory claim to protection from unfair dismissal or can bring an action for wrongful dismissal under common law.⁴⁵ In this context, the courts have developed extensive common law tests for identification of employees who must be hired for payment under terms that indicate that they are not in business on their own account. Employees are expected to be subjected to control by the employer and integrated within the workplace, personally supplying services under terms which entail ongoing mutuality of obligation between the parties as to the hire and supply of services.⁴⁶ Those hired under contracts that do not satisfy these criteria, such as casual or zero hours contracts which do not require commitment on the part of the employer to provide work, seem to be excluded from these protections from dismissal.⁴⁷

Under section 153 of the Small Business, Enterprise and Employment Act 2015 and the Exclusivity Terms in Zero Hours Regulations 2015, the only protection from dismissal associated with a zero hours contract is in relation to an attempt by an employer to enforce exclusivity of employment. There has been no attempt to suggest that zero hours workers should have the rights of 'employees' *per se* to protection from dismissal although they may gain statutory rights regarding wages and working time while providing personal services as 'workers'.⁴⁸ The term 'worker' includes those who might not come within the courts'

⁴⁴ Chiara Benassi, 'From Concession Bargaining to Broad Workplace Solidarity: The IG Metall response' in Jan Drahokoupil (ed), *The Outsourcing Challenge: organizing workers across fragmented production networks* (ETUI 2015).

⁴⁵ ERA, s.94 and s.230.

⁴⁶ See for a more thorough explanation, Simon Deakin and Gillian Morris, *Labour Law* (6th ed., OUP 2012), ch 3: 'The Employment Relationship'.

⁴⁷ *O'Kelly v Trusthouse Forte plc* [1983] ICR 728 (CA).

⁴⁸ For a helpful explanation, see <<http://www.acas.org.uk/index.aspx?articleid=4468>> accessed 6 May 2016.

definition of an employee but who ‘undertake to do or perform personally any work or services for another party’ who is not their client or customer.⁴⁹

The absence of a general protection from dismissal is far from conducive to voice (whether individual or collective).⁵⁰ In the UK, protection from dismissal associated with the exercise of voice is permitted to the individual ‘worker’ only under strictly circumscribed provisions relating to ‘whistleblowing’⁵¹ or in respect of trade union discrimination.

Curiously, care has been taken in the relevant legislation to widen the scope of the definition of the ‘worker’ who can claim protection in relation to whistleblowing, so as to explicitly include agency workers, as well as those entitled to provide substitute labour under subcontracting arrangements (that is, not necessarily obliged to provide personal service).⁵² This is not the case, where there is discrimination on grounds of trade union membership or activities. Then the person concerned needs to demonstrate under the UK Trade Union and Labour Relations Act 1992 (TULRCA) either that they are an ‘employee’ (for protection from dismissal under section 152) or a ‘worker’ (for protection from detriment under section 146) as defined in sections 295-296. It is unlikely that atypical workers, such as agency workers, can claim such protections, in the absence of a specific statutory provision to that effect. UK courts have taken the view that control over the activities of the agency worker is fractured in such a way that neither hirer nor agency can be designated as an employer and can held responsible for termination.⁵³ By hiring through agencies or with

⁴⁹ For e.g. see ERA, s.230(3) and TULRCA, s.296.

⁵⁰ For the US experience, see Joseph Slater, ‘The “American Rule” That Swallows the Exception’ (2007) 11 Employee Rights and Employment Policy 53, 88-93; Matt Finkin, ‘Employee Self-Representation and the Law in the United States’ (2013) 50(4) Osgoode Hall Law Journal 937, 946; and Anne Marie Lofaso, ‘The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work’ (2010) 5 Florida International University Law Review 497.

⁵¹ ERA, Part IVA Protected Disclosure. See also David Lewis, ‘Ten Years of Public Interest Disclosure Legislation in the UK: Are whistleblowers adequately protected?’ (2008) 82 Journal of Business Ethics 497; and David Lewis and Wim Vandekerckhove, ‘The Content of Whistleblowing Procedures: A critical review of recent official guidelines’ (2012) 108 Journal of Business Ethics 253.

⁵² ERA, s.43K: ‘extension of meaning of worker etc. for Part IVA’.

⁵³ *Montgomery v Johnson Underwood* [2001] IRLR 269 (CA).

contractual documentation designed to indicate that persons hired are independent contractor, the putative employer can secure, not only numerical flexibility, but also an absence of trade union representation. It is evident that unscrupulous employers can and do deploy such strategies.⁵⁴ Those hired as agency workers or as independent contractors would seem to have no claim to protection from termination even when experiencing trade union discrimination, unless the contractual documentation is a 'sham'.⁵⁵

In *Smith v Carillion*,⁵⁶ an agency worker in the construction industry was not hired again after 2000. The reason was that the end-user of his services in 2000 had circulated information regarding his trade union activities so that he was placed on a 'blacklist'. Smith was denied statutory protections against illegitimate trade union discrimination on the basis that he was neither an 'employee' nor a 'worker'. Today, Smith could rely on the Employment Relations Act 1999 (Blacklists) Regulations 2010 to claim that as a result of in blacklisting another person has refused to employ them (Regulation 5) or an employment agency refused any of its services (Regulation 6). However, read literally, the Regulations cover only refusal of 'employment'; not refusal to use the services of an independent contractor when their past trade union activity is made known. Further, on a strict interpretation, the end-user of agency labour is still not caught by the 2010 Regulations; it is only the employment agency that cannot engage in discrimination. Overall, the legislative situation in the UK is such that it is not difficult to discriminate against trade unionists who are atypical workers.⁵⁷

⁵⁴ *Consistent Group Ltd v Kalwak and others* [2008] IRLR 505C (CA) discussed in Lizzie Barmes, 'Learning from Case Law Accounts of Marginalised Working' in Judy Fudge, Shae McCrystal, and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart 2012).

⁵⁵ Note modification of the 'sham' doctrine discussed in *Kalwak* (n 54) in *Autoclenz Ltd v Belcher* [2011] IRLR 820 (SC).

⁵⁶ *Smith v Carillion* [2015] IRLR 467 (CA).

⁵⁷ Unless one has recourse to more creative regulatory techniques, such as data protection law. See Tonia Novitz, 'Regulating Workplace Technology: Extending the Agenda' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds) *Oxford Handbook on the Law and Regulation of Technology* (OUP 2016).

b. The ability to seek collective representation under EU law

Changes to forms of hire introduced in the wake of austerity-related policies also potentially reduce access to collective representation under EU law. For example, as an ever-increasing number of people are hired on non-standard contracts, access to EU information and consultation rights could diminish. This scenario was illustrated by the *AMS* case, where an NGO employed only eight employees on indefinite contracts, but over a hundred on what were termed ‘accompanied-employment contracts’, which the employer (and French government) thought should affect the scope for collective representation of their interests.⁵⁸ While the potential significance of trade union representation is recognised in Article 11 of the Posted Workers Enforcement Directive of 2014,⁵⁹ which acknowledges the importance of such support for the individual posted worker seeking recovery for example of payment of the minimum wage,⁶⁰ this capacity is likely to decline in the absence of entitlement to organise around atypical work. One might also predict that strikes called by trade union organisations in respect of non-workers could not claim the narrow entitlement to collective action, permitted in *Viking*, aimed at the proportionate protection of workers’ interests.⁶¹

⁵⁸ Case C-176/12 *Association de médiation sociale (AMS) v CGT*, unrep. Judgment of 15 January 2014. See discussion in Tonia Novitz, ‘The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?’ (2015) 31(3) *International Journal of Comparative Labour Law and Industrial Relations* 243, 250-252. See also Eleni Frantziou, ‘Case C-176/12 Association de Médiation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Rights in the European Union’ (2014) 10 *European Constitutional L. Rev.* 332 and Nicole Lazzarini, ‘(Some of) the Fundamental Rights Granted by the Charter May Be a Source of Obligations for Private Parties’ (2014) 51 *CML Rev.* 907.

⁵⁹ Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’)[2014] OJ L 159/11.

⁶⁰ C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, unrep. Judgment of 12 February 2015.

⁶¹ Case C-438/05 *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line* [2007] ECR I-10779. See for discussion of access to the right to strike and the effects of treating the entitlement as a ‘human rights’ issue rather than a legitimate claim of ‘workers’ and their organisations, see De Stefano (n 6) at 23-25.

Another potential difficulty is the apparently limited scope of the judge-made *Albany* exception,⁶² whereby collective agreements can be exempt from EU competition law, but only subject to certain stringent conditions.⁶³ The agreement must be ‘concluded in the form of a collective agreement’ and be ‘the outcome of collective negotiations between organisations representing employers and workers’.⁶⁴ The purpose of the agreement also has to be one which contributes ‘directly to improving ... working conditions’.⁶⁵ In 2000, a pension agreement sought by ‘members of the liberal professions’ was considered to lie outside the scope of that exception.⁶⁶

Given the acceleration in atypical employment since 2008, who counts as a ‘worker’ for the purposes of the *Albany* test has become a matter of growing significance.⁶⁷ Notably, as regards Ireland, the Troika vetoed inclusion of temporary and freelance employment within any statutory exception to the standard application of competition law,⁶⁸ as did the Irish Competition Authority more recently.⁶⁹ However, the findings of the CJEU in *FNV* may offer some hope for revisiting this approach, now that Ireland is liberated from the MoU and associated policies of austerity.⁷⁰

⁶² Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 (*Albany*).

⁶³ *Ibid.*, para. 60.

⁶⁴ *Ibid.*, para. 62.

⁶⁵ *Ibid.*, para. 63. See the recent application of this principle by the EFTA Court in *Holship Norge AS v Norsk Transportarbeiderforbund*, Judgment of 19 April 2016, which found that a collective agreement seeking protection of the use of specific dockworkers under a particular scheme by a priority of engagement rule did not come within the *Albany* test. It was observed that such a clause could defeat the interests of employees already hired by the employer, since they would not be called upon to perform that work.

⁶⁶ *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paras 68 and 69.

⁶⁷ Shae McCrystal and Phil Syrpis, ‘Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union’ in Alan Bogg and Tonia Novitz (eds) *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014).

⁶⁸ Anthony Kerr, ‘Social Rights in Crisis in the Eurozone, Work Rights in Ireland’ in Kilpatrick and De Witte (n 32), 43.

⁶⁹ For criticism and comment from the ILO CEACR see the 2015 Observation at <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3254749:NO> accessed 6 May 2016.

⁷⁰ *FNV* (n 1).

At issue in *FNV*, was a collective agreement which sought to ensure that all ‘substitute’ orchestral musicians were covered by the same minimum terms and conditions under a collective agreement regardless of whether they were hired as employees or independent service providers.

Advocate-General Wahl suggested that the self-employed might have ‘a rather weak position at the negotiating table’,⁷¹ but to the extent that they were not genuinely ‘workers’ they were undertakings subject to competition law. However, he did consider that it was in the interests of trade unions to negotiate in respect of the terms and conditions of the self-employed so as to prevent ‘social dumping’, for otherwise the workers trade unions legitimately represent could be replaced by cheaper labour.⁷² With respect, while this is certainly one reason for trade union intervention, when adopted as the sole justification it has the effect of marginalising the entitlement of atypical workers to collective voice. After all, those hired in non-standard ways may have particular concerns they wish to pursue through trade union activity, which are not of such interest to other mainstream workers. For example, they may be more concerned with wage rates or pathways to permanent employment, than promotion hierarchies.⁷³ In any case, this ‘social dumping’ rationale was not followed by the CJEU in the *FNV* judgment.

Instead, the CJEU responded by stating that ‘in so far as it was concluded in the name, and on behalf, of the self-employed services providers...’ the collective agreement could ‘not constitute the result of a collective negotiation between employers and employees’ and could not be excluded from scrutiny under EU competition law.⁷⁴ The *Albany* exception could apply only ‘if the service providers, ... on behalf of whom the trade union negotiated, [were] in fact “false self-employed”, that is to say, service providers in a situation comparable to that of employees’.⁷⁵

⁷¹ Opinion of Advocate General Wahl in *FNV*, 11 September 2014, para. 52.

⁷² *Ibid.*, paras 74-83.

⁷³ Bettina Heidinger, ‘Organizing Peripheral Workers in Parcel Delivery and Postal Services’ in *Drahokoupil* (n 44), at 210.

⁷⁴ *Ibid.*, para. 30.

⁷⁵ *Ibid.*, para. 31.

The crucial question remains how one would identify the falsely self-employed. A broad definition of a ‘worker’, utilising the overarching test of subordination in *Allonby*,⁷⁶ could lead to many workers hired on non-standard contracts being the legitimate subject of a collective agreement protected from intervention by competition law. What was unclear was whether the identification in the *FNV* judgment of particular factors such as ‘risk’ and integration could obstruct a finding that there was the necessary employment status for the exemption to apply; a generous reading would be that these were merely indicative of subordination.⁷⁷

The worst scenario would be that the collective agreement will always have to stipulate that only ‘employees’ are covered for the *Albany* exception to apply, and that each apparent independent contractor (or service provider) would have to demonstrate that they may be covered by its terms on an *ad hoc* basis. ‘Every single case then has to be proven separately – a procedure requiring time and effort.’⁷⁸ Such an approach would be obstructive of national initiatives designed to promote collective bargaining on behalf of those in atypical work; undermining practices in Germany⁷⁹ and blocking Irish attempts to extend collective bargaining coverage.⁸⁰ However, the actual treatment of these issues on return to the referring Hague Court of Appeal suggests that this need not happen.⁸¹

⁷⁶ Namely that there is a ‘person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration...’; as set out in C-256/01 *Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR I-873 (for anti-discrimination law purposes); derived from C-66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, para. 17 (for free movement purposes).

⁷⁷ *FNV* (n 1), para. 36. Cf. Novitz (n 58), 252.

⁷⁸ Heidinger (n 73), 213.

⁷⁹ *Ibid.*

⁸⁰ See text accompanying ns 68 and 69 above.

⁸¹ *NV Kunsten Informatie en Media v The State of the Netherlands*, The Hague Court of Appeal, Judgment of 1 September 2015 available in English at <<http://www.fim-musicians.org/wp-content/uploads/AF0905-1509-court-of-appeal-2015-09-01.pdf>> accessed 6 May 2016.

The Dutch Court ruled that competition law did not preclude a collective labour agreement that obliged an employer to pay minimum specific fees to self-employed orchestral substitutes. The circumstances of all the orchestral musicians were considered together, rather than individually, and the Court refused to allow the ‘atypical’ situation of some soloists to detract from the legitimacy of the general coverage of the collective agreement.⁸² The self-employed substitutes had, as a group, to be regarded as ‘false self-employed’ as they had a ‘relationship of “subordination during the contractual relationship”’.⁸³ They had to follow the instructions of the conductor, follow the required rehearsal and performance schedules and were no different from other musicians designated as ‘employees’ by virtue of their capacity to work for other clients, for example as a teacher.⁸⁴ Nor were they in any meaningful way more free than those hired as employees to accept or decline an assignment.⁸⁵ The reasoning of the Hague Court of Appeal at least offers an attractive model for inclusion of atypical workers in collective bargaining, indicating that the judgment of the CJEU in *FNV* can, in new ways, facilitate a shift in judicial attitudes post-austerity.

5. Freedom of association for the genuinely self-employed: options within the EU and Council of Europe

The *FNV* case gives potential voice to those who have been falsely designated as non-workers, but not those whose contracts for hire contain terms that indicate a genuine lack of subordination. ILO supervisory bodies, the CFA and the CEACR, have indicated that even self-employed persons are to have access to trade union representation.⁸⁶ The remaining question is whether, in the post-austerity labour market, where atypical forms of hiring are

⁸² Ibid., para. 2.9.

⁸³ Ibid., para. 2.6.

⁸⁴ Ibid., paras 2.5-2.7.

⁸⁵ Ibid., para. 2.8.

⁸⁶ *Case 2888 (Poland)* Report No 363, March 2012 available at: <http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057194> accessed 6 May 2016; and See CEACR Observation on Poland 2015 regarding preparation of a draft Act which had not, as at that date, been adopted: <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3256747,102809,Poland,2015> accessed 6 May 2016.

rife, those affected can realise the entitlements advocated by the ILO. Recent initiatives by the EU political institutions are indicative of a move towards considering this possibility, but the actualization of a clear legislative strategy is some way off. In the alternative, litigation within the Council of Europe might offer a further pathway for such reform.

a. Protection of the self-employed under EU law – scope for political and judicial will?

The European Commission, responding to Alain Supiot's report,⁸⁷ commissioned a study of 'economically dependent work', which was completed by Adalberto Perulli in 2003. That report offered a menu of options: (1) 'maintaining the status quo'; (2) 'creating a new kind of employment relationship... lying somewhere between employment and self-employment' akin to the UK statutory treatment of a 'worker'; (3) 'redefining and extending the subordinate employment concept; and (4) 'creating a hard core of social rights applicable to all employment relationships, whatever their formal classification as self-employment or subordinate employment', which Perulli acknowledged had been proposed by Supiot.⁸⁸ Perulli dutifully outlined the pros and cons of both. No action was taken apart from a Council Recommendation 2003/134/EC of 18 February 2003 concerning the improvement of the health and safety at work of self-employed workers.

Independently of the European Commission, Freedland and Kountouris advocated in 2011 a nuanced 'European Legal Framework' for personal work relations, which addressed the regulatory layers applicable to four categories: (1) termination and transfer of employment; (2) health and safety and family responsibilities; (3) control of discrimination in employment and occupations and (4) regulation of atypical forms of work.⁸⁹ They sought to systematize the 'patchy' attempts of the CJEU to address disguised employment relationships and to make sense of why broader access to rights should be provided in particular contexts. It offers a more sophisticated approach than that of Perulli, sensitive to different types of rights. Category (1) relies on traditional understandings of personal work relations, while (3)

⁸⁷ See Supiot (n 7).

⁸⁸ Adalberto Perulli, *Economically Dependent/Quasi-subordinate (Parasubordinate) Employment; legal, social and economic aspects* (European Commission 2003), 116.

⁸⁹ Freedland and Kountouris (n 4), ch 10.

or (4) may be appropriate in non-personal (and unconventional) work relations. In this way, Freedland and Kountouris offer a starting point for a thorough, principled (and historically contingent) analysis of the coverage of EU social policy protections.

One difficulty with pursuing the approach advocated by Freedland and Kountouris is the difficult linkage between EU employment status and collective organisation. Given the exclusion of freedom of association and the right to strike from social policy legislative powers under Article 153(5) of the Treaty on the Functioning of the European Union (TFEU), such matters are not formally a feature of EU social policy and therefore their scope cannot be determined by the autonomous EU definition of a 'worker'. The issue of access would seem to lie, instead, as a matter for the law of the EU Member States. The problem of course is that the EU Commission and ECB engagement in 'bailout', financial assistance and CSR recommendations, alongside the indirect effects of EU free movement and competition law, have made employment status and collective bargaining a part of EU economic, if not social policy.

In any case, it seems that the recommendations of Freedland and Kountouris came too late to be considered by the European Economic and Social Committee (EESC) in their 'own-initiative opinion' of 2011 on 'new trends in self-employed work'.⁹⁰ This opinion recognised that 'in countries where economically dependent self-employed workers are not defined as employees, a growing sector of European workers risk being left without protection'.⁹¹ The EESC noted the need to find aspects common to definitions of employed persons in the Member States and considered that European social partners should be encouraged to include the economically dependent self-employed 'in their work programmes at cross-sectoral and sectoral level'.⁹² However, the opinion did not speak to the ways in which austerity programmes were beginning to bite in terms of trade union activity or the structural legal impediments (such as access to the *Albany* exception) that might preclude such steps being taken.

⁹⁰ EESC, 'New Trends in Self-employed Work: The specific case of economically dependent self-employed work' (own initiative opinion') 2011/C 18/08 [2011] OJ C18/44.

⁹¹ *Ibid.*, 18/45.

⁹² *Ibid.*, 18/45 and C18/48 – 18/50.

In 2013, the European Parliament Directorate General for Internal Policies issued a further report which stated that, while dependent self-employment operates very differently in EU Member States, it is overall an increasing (and not wholly undesirable) trend. Indeed, it is seen as useful facet of labour market 'flexibilisation'.⁹³ While critical of 'false' self-employment used to avoid labour market regulation (which could be addressed by clear criteria applied and enforced), the report accepts that self-employment is likely to increase in ways that challenge traditional regulation of labour markets. As an unapologetic documentation of this move towards 'dynamic labour markets', the recommendation is not to end the creation of atypical work. Instead, the drafters advocate more general social protection provisions be put in place regardless of whether persons are formally 'workers'. This is to be done alongside 'social dialogue'.⁹⁴ The report did not address how the representativity of 'social partners' (especially trade unions) can be maintained in this type of labour market. It is admitted that 'social partners scarcely represent great parts of self-employed workers' but the reasons why are not considered in any depth.⁹⁵ What does however come through clearly in both the 2011 EESC opinion and the Parliamentary research report is that the issue is not wholly bogus self-employment, but rather changes to the labour market that have accelerated after the financial crisis and in the wake of austerity measures.⁹⁶

In May 2016, the Commission published a Comparative Report on 'The concept of worker under Article 45 TFEU and certain non-standard forms of employment', written by a network of experts coordinated by Ghent University. This document is discussed how 'the

⁹³ European Parliament, Directorate General for Internal Policies, *Social Protection Rights of Economically Dependent Self-Employed Workers* (2013) IP/A/EMPL/ST/2012-02 PE 507.449

⁹⁴ Ibid., 98-100.

⁹⁵ Ibid., 31. Cf the EESC opinion (2011) above which noted at 18/44 issues regarding the capacity for 'recognition of the rights of economically dependent self employed workers to form organisations and act jointly to defend or pursue their professional interests', although no mention was made of EU competition law there either.

⁹⁶ EESC opinion (2011) at 18/49. There is also perhaps an irony in the ILO 'Transition from the Informal to the Formal Economy' Recommendations 2015 (No. 204) when the transition taking place in the economy of many EU Member States is from formal modes of employment or hire to casualised, temporary and even informal employment as documented in the European Parliament (2013) report.

labour market has shifted creating new “norms” and new patterns of work not standard at the time the definition [of migrant work] was formulated’.⁹⁷ It did not investigate the reasons for such a shift, there being no mention of the role of austerity policies. Rather, the report examines appropriate judicial (and legislative) responses to such changes. The report is also (as its title indicates) narrowly focused on the definition of a ‘worker’ in the context of free movement. While the document briefly discusses the significance of key discrimination case law,⁹⁸ it makes no reference to competition law or collective bargaining. Nevertheless, one can from the series of policy documents outlined above detect an increasing desire on the part of the Commission and Parliament to engage with problems associated with ‘atypical work’, as is indicated by the further consultation initiated under the new ‘European Social Pillar’ contemplated for the Eurozone.⁹⁹

An alternative approach under EU law might be to have recourse to the provisions of the EU Charter of Fundamental Rights (EUCFR) as a basis on which to challenge breaches of the rights set out therein. Changes to configurations of collective bargaining (such as removal of sectoral bargaining and rendering collective agreements unenforceable) could, for example, be regarded as a breach of Article 12 (freedom of association) and Article 28 (right of collective bargaining). The difficulty is in establishing that changes to employment status which impact upon freedom of association and collective bargaining amounts to such a breach. Certainly, Article 28 only applies to ‘workers’, so without establishing new broader ‘criteria’ for their identification, those contractual agreements which fall outside the CJEU understandings of ‘employment’ would seem to have no entitlement under that Charter provision.¹⁰⁰ More promising might be ‘the right of everyone to form and to join trade unions for the protection of his or her interests’ under Article 12.

⁹⁷ Charlotte O’Brien, Eleanor Spaventa and Joyce De Coninck, *Comparative Report 2015: The concept of worker under Article 45 TFEU and certain non-standard forms of employment* (European Commission 2016) (*‘Comparative Report 2015’*), 11.

⁹⁸ *Ibid.*, at 11, 17, 20, 67 and 74.

⁹⁹ For which see

<<http://ec.europa.eu/social/main.jsp?catId=89&langId=en&newsId=2487&furtherNews=yes>> accessed 6 May 2016.

¹⁰⁰ Cf. *Fenoll* (n 4) which seems to indicate that the same autonomous understanding of ‘worker’ applies to both EU legislation and the Charter.

Nevertheless, the findings to date of the CJEU do not bode well for a challenge on Charter grounds to EU austerity-related recommendations and the national policies which implement these. As Kilpatrick observes, despite the paucity of reasoning for such a conclusion, there needs to be ‘EU law’ on which to hinge such a case and this is taken not to include any provision in a MoU under bailout or other financial arrangements.¹⁰¹ More recent case law on the subject of ‘fixed term contracts’ confirms this view in relation to domestic implementation of austerity measures.

In *Poclava*, the Spanish ‘entrepreneurs contract’ of one year’s fixed duration adopted to realise the flexibility demanded by EU institutions,¹⁰² was regarded as a particular form of contract that did not fall within the scope of Fixed-Term Work Directive.¹⁰³ More significantly, ‘even though protection for workers in the event of the termination of the employment contract is one of the means of attaining the objectives laid down in Article 151 TFEU and even though the EU legislature has competence in this field..., situations that have not been covered by measures adopted on the basis of those provisions do not fall within the scope of EU law...’¹⁰⁴ Therefore, the threshold of implementation of EU law necessary under Article 51(1) of the EUCFR was not met.¹⁰⁵ This rendered Article 30 of the EUCFR inapplicable. That judgment indicates that there can be no recourse to arguments relating to Articles 12 and 28 where no EU legislative measures have been taken – and the ‘right to association’ cannot be the subject of such direct legislation by virtue of Article 153(5) of the TFEU.

¹⁰¹ See Claire Kilpatrick, ‘Are the Bailouts Immune to EU Social Challenge Because They are Not EU Law’ (2014) 10 European Constitutional Law 393 at 397 and 418-9. She cites at fn 15: C-434/11 *Corpul Național al Polițiștilor*, Order of 14 Dec. 2011; C-134/12 *Corpul Național al Polițiștilor*, Order of 10 May 2012; C-462/11 *Cozman*, Order of 14 Dec. 2012; C-127/12 *Sindicato dos Bancários do Norte*, Order of 7 March 2013; C-264/12, *Sindicato Nacional dos Profissionais de Seguro v. Fidelidade Mundial*, Order of 26 June 2014.

¹⁰² See text accompanying n 37.

¹⁰³ C-117/14 *Poclava v Toledano*, Judgment of 5 February 2015 at para. 38.

¹⁰⁴ *Ibid.* para. 41.

¹⁰⁵ *Ibid.*, para. 42.

b. Claiming freedom of association as a human right: the role of the Council of Europe

In the Council of Europe, two human rights instruments could be of assistance to those seeking legal entitlement to freedom of association and collective bargaining rights. The ECHR provides rights for ‘everyone’ including ‘freedom of association’. Indeed, Article 12 of the EUCFR was modelled on this provision. This leaves some opening for the austerity measures affecting collective bargaining (and those relating to employment status which affect access to freedom of association) to be addressed without attempting to redefine who is a worker or precisely which persons can claim particular entitlements. The alternative is to bring complaints or utilise the reporting mechanisms available under the ESC, in respect of which it might be alleged that the austerity measures outlined in this paper violate ‘the right to work’ under Article 1, the right to fair remuneration under Article 4, the right to organise under Article 5 and the right to bargain collectively (and take collective action) under Article 6. Article 1 of the ESC has the advantage of not requiring consideration of the definition of a ‘worker’, while reliance on the other provisions may be more complex. Challenging austerity measures under either instrument is far from straightforward, but perhaps offers opportunities that have not yet been appreciated.

For some time, the ECtHR was unwilling to regard collective bargaining as an essential element of the guarantee of freedom of association set out in Article 11. However, this lacuna was addressed in the seminal case of *Demir & Baykara v Turkey*.¹⁰⁶ This case concerned the collective bargaining entitlements of public sector workers and, in particular, the enforceability of the collective agreement which their trade union had concluded. The restrictions imposed by the Turkish State were found to not fall within the exception set out in Article 11(2) which allows for certain proportionate measures prescribed by law and necessary in a democratic society. That judgment, then, has potential relevance to the restriction of collective bargaining we have seen in the public sector under austerity, including attempts to contract out what were formerly public services so as to place workers outside past collective bargaining structures, to render collective agreements unenforceable

¹⁰⁶ AppIn 34503/97 *Demir and Baykara v Turkey* 12 November 2008 [2009] IRLR 766; and see Keith Ewing and John Hendy, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39 ILJ 2.

and even place certain service providers outside the lawful scope of trade union membership and activities.

A difficulty could be the deference that the ECtHR has shown to implementation of EU law by Member States, according to which it is presumed that EU law offers ‘equivalent’ protection of fundamental rights to that of the Convention system.¹⁰⁷ However, given that EU led austerity measures are not, for the time being, being treated as a species of EU law and cannot be subjected to judicial review by the CJEU there may be a stronger argument for their consideration by the ECtHR.

Another obstacle is that, when a measure is ‘not the core but a secondary or accessory aspect of trade union activity’, the ECtHR tends to apply a wide margin of appreciation to States. This is best illustrated by the *RMT v UK* case, where the UK’s anomalous all out ban on secondary action was upheld as lawful as such an ‘accessory’, despite its absurdity in current labour markets and criticism of the same from the ILO and the European Committee of Social Rights (ECSR).¹⁰⁸ Would the exclusion of those designated ‘non-workers’ from the ability to join a trade union or engage in effective collective bargaining be regarded as ‘secondary’ or ‘accessory’?

One would hope not, but the *RMT* case did reveal the Court’s acute political awareness of controversial decisions and its reluctance to challenge powerful States like the UK. There would seem to have been reluctance to challenge the economic might of the EU when dictating austerity measures, perhaps due to the political sensitivity of potential EU accession to the ECHR.¹⁰⁹ In cases concerning reduction of pensions in an austerity

¹⁰⁷ Appln 45036/98 *Bosphorus Hava Yollari Turzim ve Ticaret Anonim Sirketi v Ireland* 30 June 2005. There are of course issues as to whether this would change with accession of the EU to the ECHR but accession is looking increasingly unlikely in the near future. See Louise Halleskov Storgaard, ‘EU Law Autonomy versus European Fundamental Rights Protection – On *Opinion 2/13* on EU Accession to the ECHR’ (2015) 15 Human Rights Law Review 485.

¹⁰⁸ Appln 31045/10 *RMT v UK* 8 April 2014. See also Alan Bogg and Keith Ewing, ‘The Implications of the *RMT* Case’ (2015) 43 ILJ 221.

¹⁰⁹ See Storgaard (n 107).

context,¹¹⁰ the ECtHR found the measures to be in defence of legitimate interests and proportionate, despite earlier case law which indicated that the Court should consider whether the person affected bore an 'individual and excessive burden' and whether the public authorities had 'acted in good time, in an appropriate matter and with the utmost consistency'.¹¹¹ It was not for the ECtHR 'to decide whether alternative measures could have been envisaged in order to reduce the State budget deficit and overcome the financial crisis'.¹¹²

By way of contrast, the supervisory body responsible for the implementation of the ESC, the ECSR, has not been willing to defer to the economic policies pursued under austerity by the EU or its member states and has, criticised austerity measures (in the case of Greek pensions) leading to a Resolution issued by the Council of Europe's Committee of Ministers in 2014.¹¹³ Further, in *LO and TCO v Sweden*,¹¹⁴ the ECSR has indicated that Swedish legislation seeking to restrict access to industrial action (which would have been directed at promoting collective bargaining for workers temporarily posted abroad within the EU), was in breach of, among other Charter provisions, Article 6(4).¹¹⁵ The ECSR made clear that national provisions based on an EU directive or in response to a CJEU judgment can still be

¹¹⁰ Appln 13341/14 *da Silva Carvalho Rico v Portugal* 24 September 2015; and Appln 57665/12 and 57567/12 *Koufaki and Adedy v Greece* 7 May 2013. The latter is discussed in Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21 *European Law Journal* 521, 544.

¹¹¹ Appln 10373/05 *Moskal v Poland* 15 September 2009, paras 51-52. Discussed in Tonia Novitz, 'Labour Rights and Property Rights: Implications for (and Beyond) Redundancy Payments and Pensions?' (2012) 41(2) *ILJ* 136-165; and Petra Herzfeld Olsson, 'Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights' in Filip Dorssemont, Kalua Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (ETUI/Hart 2013).

¹¹² See Press Release available at <[http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"003-5179864-6408738\"\]}](http://hudoc.echr.coe.int/eng#{\)> accessed 6 May 2016.

¹¹³ See finding of breach of Article 12(3) in Complaint Nos. 76-80/2012 culminating in Resolution Res ChS (2014) 10 on 2 July 2014. Documented more fully by Salomon (n 110) at 527 et seq.

¹¹⁴ Complaint No. 85/2012, decision on admissibility and the merits, *LO and TCO v Sweden*, para. 120.

¹¹⁵ *Ibid.*

subjected to scrutiny in terms of their compliance with the ESC.¹¹⁶ That decision challenging the outcomes of implementation of EU law has also been endorsed by the Committee of Ministers.¹¹⁷

There have been two further collective complaints to the ECSR which have yet to be decided but may be relevant to employment status and collective labour rights. One is a complaint by the Greek Confederation of Labour lodged on 25 September 2014¹¹⁸ which claims that the situation in Greece is not in conformity with, *inter alia*, Articles 1 and 4. This will be interesting since not just workers but ‘everyone’ is to ‘have the opportunity to earn his living in an occupation freely entered upon’ under Article 1. Austerity measures have arguably robbed certain people of their capacity to enter standard forms of employment and earn a living. Further, Article 4 that gives ‘workers’ the right to a fair remuneration, includes under paragraph 4 ‘a reasonable period of notice for termination of employment’, which has been stripped away from those whose employment status has been changed.

The other complaint has been brought by a higher level group of eleven trade unions in the field of health care, education, the judiciary, police and banking, reflecting the concerns of many public sector workers. It is alleged that Croatia has violated the rights of workers to organise and bargain collectively under Articles 5 and 6 of the ESC.¹¹⁹ Both Charter provisions however require a threshold requirement that the claimants represent ‘workers’.

The ‘worker’ threshold may fairly easily be overcome, since the ECSR has already established, with respect to health and safety under Article 3, that: ‘The term “workers” used in Article 3 covers both employed and self-employed persons, especially as the latter are often employed in high-risk sectors.’¹²⁰ The prohibition on employment of children

¹¹⁶ Ibid., paras 72-4.

¹¹⁷ Resolution CM/ResChS(2014)1, 5 February 2014.

¹¹⁸ Complaint No. 111/2014 *Greek General Confederation of Labour (GSEE) v Greece*, Decision on Admissibility 19 May 2015.

¹¹⁹ Complaint No. 116/2015 *Matica Hrvatskih v Croatia*, Decision on Admissibility, 9 September 2015.

¹²⁰ Council of Europe, *Digest of the Case Law of the European Committee of Social Rights* (Council of Europe 2008) at 38, 203 and 208-210.

under the age of 15 also applies to the self-employed under the ECSR jurisprudence on Article 7.¹²¹ This understanding of employment status seems more generous to those engaged in atypical work than is yet contemplated by the EU or in the UK. The ECSR *Digest* of its case law states that Article 5 ‘covers not only workers in activity but also persons who exercise rights resulting from work (pensioners, unemployed persons)’,¹²² which obviously does not go as far as the jurisprudence on Articles 3 and 7. We will have to see whether there is further extension of that scope in these more recent complaints.

It has recently been argued in a compelling policy paper written by Olivier De Schutter that the EU could usefully formalise its relationship with the ESC. He points out that there is already acknowledgement of the influence of the ESC in the EU Treaties and in the explanatory notes to the EUCFR. The EU could specify which provisions of the ESC it expects its Members to select as applicable to them and accession would not face the same obstacles identified by the CJEU with respect to the ECHR. However, one might wonder whether, if the relationship became so very formal, the ECSR would still have the courage to voice its concerns at EU policy.¹²³ De Schutter might yet be offering an institutional trap that does not acknowledge the influence of the ‘soft law’ embarrassment that the ECSR can currently offer. If reflexive labour law teaches us anything it is to be wary of harder line government when governance may be more efficacious in the sense of being transformative, for example in shaping the orientation of the CSRs.¹²⁴ Perhaps labour lawyers should wait and see what can be achieved by the ECSR post-austerity under its privileged soft law position before endorsing De Schutter’s proposal.

¹²¹ Ibid., 59. As does Article 10 relating to access to vocational training, see also *ibid.*, 70 and 77; and Article 12 on access to social security protection see *ibid.*, 89 and 275.

¹²² Ibid., 49.

¹²³ Olivier De Schutter, *The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights* (D-G for Internal Policies/European Parliament 2016).

¹²⁴ Ralf Rogowski, *Reflexive Labour Law in the World Society* (Edward Elgar 2013); also Simon Deakin and Ralf Rogowski, ‘Reflexive Labour Law, Capabilities and the Future of Social Europe’ in Ralf Rogowski, Robert Salais and Neil Whiteside (eds), *Transforming European Employment Policy – Labour Market Transitions and the Promotion of Capability* (Edward Elgar 2011).

6. Conclusion

The legislative design under austerity of flexible forms of employment (avoiding the much vaunted 'rigidities' of past European industrial relations systems) has created a secondary, large informal labour market. There are problems which stem from the domestic laws of Member States like the UK which do not give full protections from trade union discrimination to those who fall outside the category of 'employee' or 'worker'. A further potential difficulty may be posed by EU law. For example, competition law can be used to challenge a collective agreement that covers the genuinely 'self-employed'. So is there any remedy for the erosion of collective representation and action which has followed the acceleration of atypical forms of work during austerity? It has been argued here that steps are tentatively being taken in this direction within the EU, but that human rights protection in the Council of Europe offers further opportunities for redress.

There is a potentially strong case for reliance on Article 11 of the ECHR, which after all applies to 'everyone'. This entitlement of the non-worker to freely associate and to bargaining over terms and conditions of hire could be recognised in a judgment of the ECtHR. However, the ECtHR has been reluctant to intervene in the emergency economic measures undertaken by the EU States regarding property and pensions, which are likely to continue to be seen as 'proportionate'. This does not bode well for Article 11 claims relating to implementation of EU austerity measures.

Through a softer mechanism, the ESC supervisory system, the Council of Europe has resisted the removal of social rights in the context of austerity, at least regarding pension provision, with other significant cases forthcoming. More importantly, the requisite majority in the Committee of Ministers within the Council of Europe has seen fit to add force to the ECSR findings. It is possible that the ECSR may regard itself as restricted by the wording of Articles 5 and 6 so that rights of collective bargaining and action can only be claimed by 'workers'. However, that impediment might yet be overcome through formulation of a broader definition of 'worker' than that which we have seen in the EU or certain EU member States (such as the UK) to date. If so, the soft law mechanisms of the Council of Europe have the potential to inform soft law in the EU, thereby restoring access to individual employment

status alongside collective rights in Europe. As Europe emerges from austerity, such approaches to the transfigured labour market offer alternative routes forwards.